No. 105.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

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T. K. WILSON, PLAINTIFF IN ERROR,

vs.

J. F. STANDEFER, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The defendant in error, as plaintiff, commenced this action in trespass to try title against plaintiff in error, as defendant, in the district court of Tom Green county, Texas, to recover the title and possession of section No. 42, district 11, S. P. R. R. Co., in said county, said land being what is known as public free-school land, plaintiff in error claiming title to said land under a contract to purchase made by one Thomas Dolan with the State of Texas on May the 1st, 1882, which sale was made by the State of Texas to him

under the act of the legislature of Texas approved July 8, 1879, and the amendment thereto approved April 6, 1881, and defendant in error claiming title thereto under a contract to purchase made by him with the State of Texas, September 13, 1897, under chapter 12 A, title 87, Revised Civil Statutes of Texas of 1895, and the amendment thereto, chapter 129, General Laws of Texas of 1897.

Plaintiff in error, as defendant in said court, answered by plea of not guilty. There being no controversy between the parties as to the facts, the case was submitted to the trial court on an agreed statement of the facts, in which it is shown that the land in question was properly and regularly placed upon the market for sale by the State of Texas under the act of the legislature of Texas approved July 8, 1879, and the amendment thereto approved April 6, 1881, and was duly sold to Thomas Dolan under his application to purchase, dated May 1, 1882, he having complied with all the provisions of the law to create a valid and binding contract between himself and the State of Texas for the purchase of said land.

That thereafter said Dolan sold and conveyed said land, as authorized and permitted by said act, and by regular and consecutive chain of transfers the title thereto vested in the Ostrander and Loomis Land and Livestock Company on April 4, 1888, and said company mortgaged said land with others to the Knickerbocker Trust Company to secure payment of $600,000 due holders of its coupon bonds; that in 1892 said Ostrander and Loomis Land and Livestock Company became insolvent and unable to meet any of its obligations, and thereafter, in the district court of Tom Green county, judgment of foreclosure was entered on May 17, 1898, foreclosing said mortgage and ordering the sale of the lands so mortgaged, including said survey No. 42, and at said foreclosure sale under said judgment plaintiff in error became the purchaser of said land, paying a valuable

consideration therefor, and the same was conveyed to him by good and sufficient deed.

Prior to said judgment and foreclosure sale, on August 20, 1897, the commissioner of the general land office of Texas, acting under and by virtue of the authority conferred upon him by the act of the legislature of Texas entitled "An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State under any of the various acts of the legislature for failure to pay any portion of the interest thereon, approved March 25, 1897," endorsed on the application of said Thomas Dolan for the purchase of said land aforesaid "land forfeited," and caused an entry to that effect to be made on the account kept of said Thomas Dolan's purchase, as aforesaid, and declared said land forfeited to the State without the necessity of re-entry or judicial ascertainment; had the land duly and regularly reclassified under chapter 12 A, title 87, Revised Civil Statutes of Texas of 1895, and the amendment thereto, chapter 129, General Laws of Texas of 1897 (Rec., p. 6). Thereafter, on September 13, 1897, defendant in error, J. F. Standefer, made his application to the commissioner of the general land office to purchase said land, and same was sold to him, and he entered into a contract with the State of Texas for the purchase thereof (Rec., p. 7).

Thereafter, on April 25, 1899, plaintiff in error, T. K. Wilson, tendered to the State treasurer all interest and principal due on account of said Thomas Dolan's purchase aforesaid, which was refused for the reason, as stated by said treasurer, "that the account for said land under said act has been forfeited for non-payment of interest to January 1st, 1896" (Rec., p. 8), and on the same day said Wilson, plaintiff in error, made written demand on the commissioner of the general land office for the issuance of a patent to said survey of land, tendering all fees required by law, and the said commissioner of the general land office refused to issue said patent for the reason that it "appeared from the records of

his office that the sale to Thos. Dolan was made under the act of 1879 and amendment thereto of 1881, and that said Dolan's purchase of this land was forfeited August 20, 1897, by the commissioner of the general land office for nonpayment of interest, and because this land was afterwards, on September 13, 1897, sold to J. F. Standefer" (Rec., p. 8).

Said forfeiture declared by the commissioner of the general land office August 20, 1897, was without any judicial proceedings whatever, and no judicial proceedings of any kind or character have ever been had by the State to forfeit or rescind the said sale to Thomas Dolan, as aforesaid, but said forfeiture was made under said act of March 25, 1897, and was without re-entry or judicial ascertainment, and without actual or personal notice to said Dolan or any of his vendees, or to the mortgagees or beneficiaries aforesaid, and on the forfeiture of said land the State did not and has not made any offer to pay to said Dolan or his vendees the purchase-money or any interest paid on his obligation for said land, and did not return or offer to return said obligation, but the same is still held and retained by the State treasurer (Rec., p. 8).

The district court rendered judgment in favor of said T. K. Wilson, plaintiff in error here, from which said judgment said J. F. Standefer, defendant in error here, appealed to the court of civil appeals for the third supreme judicial district of Texas, which court certified to the supreme court of Texas for its opinion the question involved in said suit, the question being as follows:

"The land involved in this suit is public free-school land, the sale of which was authorized under the act of the legislature of Texas, approved July 8, 1879, and the amendment thereto, approved April 6, 1881, and was duly and regularly placed upon the market for sale under said acts, when one Thos. Dolan became the purchaser thereof, complying with the provisions of the law in effecting the purchase. The appellee claims title under the Dolan purchase. Default in the payment of the interest due under the Dolan purchase

having been made January 1st, 1896, the commissioner of the general land office on August 20, 1897, declared a forfeiture of said purchase without re-entry or judicial ascertainment, and the land was duly and regularly reclassified and appraised under chapter 47, of the Acts of 1895, and the amendment thereto, chapter 129, Acts of 1897, and placed upon the market and purchased by appellant as an actual settler. The forfeiture declared August 20, 1897, was under and by virtue of the act of the legislature of the State of Texas, approved March 5th (25th), 1897. The contention of the appellant is that this forfeiture was valid, and his purchase thereafter vested in him title to said land subject to the payment of the purchase-money therefor to the State. The contention of appellee is that the forfeiture declared August 20, 1897, whether done by virtue of the act of March 5th, (25th), 1897, or any other act of the legislature was invalid, and did not affect his right in the land because the Dolan purchase under which he held title having been made under the act approved April 6, 1881, which provides for a forfeiture on default of payment of interest by judicial ascertainment, that method of forfeiture or rescission became and was a part of the contract, and any subsequent act of the legislature which authorized a forfeiture of a purchase under said act without judicial ascertainment, was an impairment of the obligation of a contract, and is in violation of section 10, art. 1, of the Constitution of the United States. The question was submitted to the court below, which held the forfeiture invalid and rendered judgment for the appellee.

"The above statement is taken from the brief of appellee, which we find substantially correct. The court of civil appeals, through its chief justice certifies to the Supreme Court under the facts as stated, the following questions:

"1. Did the State, through its commissioner of the land office, without judicial proceedings, have the authority to legally declare a forfeiture of the Dolan title on account of the failure to pay the interest as stated?

"2. Are the principles of law as decided by the supreme court of this State in the case of Fristoe *vs.* Blum, 45 S. W., 998, applicable and controlling of the question certified?"

And the Supreme Court held such forfeiture valid (Rec., pp. 15–19), and upon this opinion the court of civil appeals

rendered judgment reversing the judgment of the district court and rendered judgment against plaintiff in error, T. K. Wilson, and in favor of defendant in error, J. F. Standefer, for said land (Rec., p. 21).

Plaintiff in error, Wilson, in due time filed a motion for rehearing in the court of civil appeals (Rec., p. 22), which said motion for rehearing was overruled (Rec., p. 24), and plaintiff in error made his application to the supreme court of Texas for a writ of error (Rec., p. 24), which was refused (Rec., p. 29). Plaintiff in error then applied for a writ of error to the Supreme Court of the United States, which was allowed by the Honorable H. C. Fisher, chief justice of the said court of civil appeals for the third supreme judicial district of Texas, with a supersedeas bond of $1,000 (Rec., p. 34), which was given (Rec., p. 30), and writ of error was duly issued (Rec., p. 34) and service thereof admitted by counsel for defendant in error (Rec., p. 43); and plaintiff in error now asks that the judgment of said court of civil appeals be revised on account of the errors assigned, those deemed material being as follows:

THIRD.

The said court of civil appeals erred in deciding in favor of the validity of statutes and authority exercised under the State of Texas, drawn in question in this cause, on the ground of their being repugnant to the Constitution and laws of the United States (Rec., p. 32).

FOURTH.

The said court of civil appeals erred in giving validity to the provisions of the act of the legislature of the State of Texas approved March 25, 1897, drawn in question in this cause under a construction thereof which impaired the obligation of the contract entered into between the State of Texas and Thomas Dolan, under which plaintiff in error claims,

under and by virtue of the provisions of the act of the legislature of the State of Texas approved July 8, 1879, and amendment thereto approved April 6 (Rec., p. 32).

FIFTH.

The said court of civil appeals erred in sustaining and affirming the validity of the authority exercised under the State of Texas by the commissioner of the general land office of Texas in forfeiting, canceling, and annulling the contract entered into between the State of Texas and Thomas Dolan, under which plaintiff in error claims, drawn in question in this cause, on the ground of its being repugnant to the Constitution and laws of the United States (Rec., pp. 32, 33).

SIXTH.

The said court of civil appeals erred in sustaining and affirming the action of the State of Texas, through its commissioner of the general land office, exercised under and by authority of the act of the legislature of Texas approved March 25, 1897, in forfeiting and canceling, without judicial ascertainment and proceedings, the contract of purchase entered into between the State of Texas and Thomas Dolan, under which plaintiff in error claims; which said contract was made and entered into under and by virtue of the provisions of the act of the legislature of Texas approved July 8, 1879, and the amendment thereto approved April 6, 1881, by the terms and provisions of which said act and the contract so entered into thereunder it was provided as a part thereof that a forfeiture of said contract for a default in payment of the annual interest due thereon should be had by judicial ascertainment and proceedings, the validity of which said act of March 25, 1897, and the action of the commissioner of the general land office so exercised thereunder was drawn in question in this cause by plaintiff in error on the ground of their being repugnant to the Constitution and

laws of the United States as impairing the obligations of the contract (Rec., p. 33).

SEVENTH.

The said court of civil appeals erred in reversing the judgment of the district court of Tom Green county, rendered in this cause in favor of plaintiff in error, and in rendering judgment against plaintiff in error, and in favor of defendant in error, and said court erred in not affirming the judgment of the district court of Tom Green county (Rec., p. 33).

I.

WHEN THOMAS DOLAN ENTERED INTO THE CONTRACT WITH THE STATE OF TEXAS FOR THE PURCHASE OF SAID LAND, UNDER AND BY VIRTUE OF THE PROVISIONS OF THE ACT OF THE LEGISLATURE OF TEXAS APPROVED JULY 8, 1879, AND THE AMENDMENT THERETO APPROVED APRIL 6, 1881, SECTION 12 OF THE SAID ACT OF JULY 8, 1879, PROVIDING FOR A JUDICIAL FORFEITURE OF SAID PURCHASE ON DEFAULT IN PAYMENT OF THE ANNUAL INTEREST, BECAME A PART OF THE CONTRACT BETWEEN THE STATE OF TEXAS AND SAID THOMAS DOLAN.

To avoid the force of the position of plaintiff in error that the act of March 25, 1897, authorizing the non-judicial forfeiture of purchases of school land under the act of July 8, 1879, was in violation of section 10, article 1, of the Constitution of the United States as impairing the obligation of the contract, the supreme court of Texas, in answer to the certified question submitted to them by the court of civil appeals, held that section 12 of the act of 1879, prescribing the method of forfeiture, was not a part of the purchaser's contract (see opinion, Rec., p. 18), and say:

"If the provision referred to (section 12) is to be considered a term of the contract specially providing for such a

remedy, it may be true that it should be treated as prescribing the exclusive mode of rescission, or, in the language of the act itself, of 'forfeiture' and that a subsequent law which undertook to substitute another mode, would be subject to the objections urged" (Rec., p. 16).

Whether section 12 of the act of 1879 is a part of the contract is a question which this court will decide for itself.

McGahey *vs.* Virginia, 135 U. S., 665.

McCulloch *vs.* Virgina, 172 U. S., 102.

Chicago, B. & Q. R. Co. *vs.* State of Nebraska, 170 U. S., 57.

Houston & T. C. R'y Co. *vs.* Texas, 20 S. C. Rep., 549.

The Federal question is squarely presented by the record and submitted by the court of civil appeals on certified question to the supreme court of Texas (Rec., pp. 14, 15).

Columbia Water Power Co. *vs.* Columbia Electric St. R'y, Light & Power Co., 172 U. S., 475.

It is true the supreme court say that the State of Texas had the right to rescind said contract as at common law, but this they admit could not be done if section 12 of the act of 1879 fixed by agreement the method of forfeiture by judicial proceeding, and a proper decision of the question turns upon whether section 12 is a part of the contract and fixed the method of forfeiture for default in payment of interest, and whether it did or not is a question that the Supreme Court of the United States will determine for itself independent of the decision of the supreme court of Texas.

That section 12 of the act of 1879 is a part of the contract, and fixed by agreement the method of forfeiture for default in the payment of interest we think is clear from the reading of the law.

The land in question is a part of the land set apart by the constitution and laws of Texas to the public free-school fund (Rec., p. 13). The constitution of Texas, 1876, article 7, section

4, provides that said land shall be sold "under such regulations, at such time and on such terms as may be prescribed by law." This provision vested in the legislature the exclusive right to determine when said land should be sold, and to prescribe the *regulations* and *terms* on which it should be sold.

In obedience to this provision of the constitution the legislature of Texas, by the act approved July 8, 1879, entitled "An act to provide for the sale of the alternate sections of land in organized counties as surveyed by railroad companies and other works of internal improvements, and set apart for the benefit of the common-school fund; to provide for the investment of the proceeds and to repeal all laws in conflict therewith," authorized the sale of said lands and prescribed the *regulations* and *terms* upon which they should be sold, the first section of said act declaring that said lands "shall be brought into market and disposed of in the manner hereinafter provided." Sections 2, 3, 4, and 5 provide for the view, classification, and appraisement and placing the land upon the market. Sections 6, 7, 8, 9, 10, and 11 prescribe the method of applying to purchase, making payment of one-tenth of the appraised value of the lands applied for, the execution of the obligation for the deferred purchase-money, requiring all interest to be paid annually on the first day of March of each year, the forwarding of the note to the commissioner of the general land office to be registered, and to be sent by him to the State treasurer to be kept, the surveying of the land and the return of field-notes and the keeping of an account in the land office with the purchaser. Section 12 provides for a forfeiture for default in payment of annual interest, which is as follows:

"SECTION 12. If upon the first day of March following the maturity of any payment, the interest on money due has not been paid to the State treasurer and his receipt filed with the commissioner of the general land office, as provided in section eleven of this act, it shall be the duty of

said commissioner to notify the county or district attorney of the county in which such land is situated of such failure, giving the name of the purchaser so failing to make payment, with the amount and date of his note, and the amount of principal and interest due at the time of such failure; and upon the receipt of such notice it shall be the duty of the county or district attorney to cause a writ to be issued and served on the purchaser, or in case of his death, upon his heirs or legal representatives, requiring him or them to show cause why he or they shall not be ejected from such land; and upon his or their failure to show that the annual installments of interest have been paid, as above provided, a judgment shall be rendered against him or them, and a writ of possession shall be issued in favor of the State. That a copy of such judgment, under the signature and seal of the clerk of the court rendering the judgment, shall be forwarded to the State treasurer, who shall immediately endorse the obligation of such purchaser 'forfeited,' note the fact of such endorsement on the copy of judgment aforesaid, and forward the same to the commissioner of the general land office. The said commissioner shall file said copy of judgment with the claim of such defaulting purchaser, and shall note such forfeiture on the account kept with said purchaser, and shall notify the surveyor of the county in which said land is situated that said land is again for sale."

Section 13 provides for a sale of said land after such forfeiture, and section 14 provides for an extension of twelve months for payment of any installment of interest in the event of the death of the purchaser; section 15 authorizes and permits the purchaser to sell said land "after he has made his first payment on the same;" section 16 provides for the taxation of such land from the date of the first payment to the treasurer of the State; section 18 provides that the commissioner of the general land office and attorney general shall prescribe the necessary detail of instructions to carry the law into effect, and section 19 repeals all laws in conflict therewith.

By the act of April 6, 1881, sections 1, 2, 3, 4, 5, 6, 7, and 8 of the said act of July 8, 1879, was amended, reducing the

rate of interest on deferred purchase-money from 10 to 8 per cent., and giving twenty instead of ten years in which to make final payment of purchase-money, and authorizing sale of such land situated in unorganized as well as organized counties; otherwise no change was made in the said act of 1879.

Section 8 of said act as amended by the act of April 6, 1881, is as follows:

"SEC. 8. That so soon as the applications above named have been received by the surveyor, the applicant shall execute his obligation or promissory note for the balance of the appraised value of the land he desires to purchase, agreeing and stipulating to pay to the governor of the State of Texas and his successors in office on the first day of January of each year one-twentieth of the amount of his obligation or promissory note with eight per cent. interest on such amount of the principal as may be due at the date of each payment, giving in said obligation such description of the land purchased as is contained in his application: *Provided*, That the purchaser may have the privilege of paying the entire amount of the appraised value of said land at the date of purchase, or such amount of principal and interest as may be due at any time subsequent to the execution of his obligation or promissory note: *Provided*, That any payment of principal may be deferred for one or more years, except the first one-twentieth, but all payments of both principal and interest must be paid inside of twenty years, and all interest must be paid annually on or before the first day of March of each year. When any land sold under the provisions of this act shall be timbered land, no person shall have the right to cut and remove any of the timber therefrom until the purchase-money has been paid in full."

In accordance with the provisions of said acts, Thomas Dolan made his application to purchase said land on May the 1st, 1882 (Rec., p. 4), and paid to the county surveyor all fees required by law. He also paid to the State treasurer one-twentieth of the appraised value of said land, and the treasurer issued to him his receipt therefor (Rec., p. 4).

Both in the application and in the receipt for the first payment, reference is made to said acts. On the same date, said Dolan executed to the State his obligation for the deferred purchase-money, which is as follows:

"$608.00. *Note for Purchase-money, Common-school Land.*

"For value received, I, the subscriber hereto do promise to pay to the governor of the State of Texas and his successors in office, the sum of six hundred and eight dollars with interest thereon at the rate of 8 per cent. per annum as hereinafter specified, the same being the purchase-money for the following-described tracts of land this day purchased by me from the State of Texas in accordance with the terms of an act of the legislature of said State, viz: An act to amend the caption and sections 1, 2, 3, 4, 5, 6, 7 and 8, of an act to provide for the sale of alternate sections of land in organized counties as surveyed by railroad companies and other works of internal improvements and set apart for the benefit of the common-school fund: to provide for the investment of the proceeds, and repeal all laws in conflict therewith, approved July 8, 1879, and to provide for the sale of such land in unorganized counties, approved April 6, 1881, to wit: Survey 42, district 11, surveyed for the S. P. R. R. Co., Concho county. I am to pay, or cause to be paid into the treasury of the State of Texas, on the first day of January of each year one-twentieth of the above amount, together with the annual interest of 8 per cent. upon the unpaid principal, until this entire obligation is liquidated, and it is expressly understood that I am to comply with all the conditions and requirements, and am subject to all of the penalties contained and prescribed in the above-recited act. Witness my hand, this the 1st, day of May, 1882.

"THOMAS DOLAN."

Rec., p. 5.

The said acts of the legislature, the application of Dolan, his obligation and receipt for the first payment, being an acceptance of the offer made by the law, constitutes the contract entered into between said Dolan and the State for the purchase of said land. The State by the

said acts offered the land for sale and prescribed the terms and conditions of sale and the method of forfeiture or rescission for a breach of the contract to pay the annual interest. Every part of those acts which prescribe any duty or secure any rights enters into and forms a part of that contract. The obligation rested upon Dolan and his vendees to pay the annual installments of interest on or before the 1st day of March of each year, but a failure to do so did not, *ipso facto*, work a forfeiture. If the State, because of such default, wished to forfeit or rescind the purchase, that act in a specific and minute manner prescribes how it should be done. If it was the intention of the State that she should have and exercise her common-law right of forfeiture or rescission, why did she in this act provide for a judicial rescission? To accept the construction of the supreme court of Texas upon section 12 is to say that it is meaningless. It imposes no obligation upon the State, and confers and secures no right to the purchaser. Why was it incorporated in the act?

This construction of section 12, we submit, cannot be sustained upon reason or authority. What is the contract between the State and purchaser? The purchaser agreed to pay so much for the land, payable in twenty years, with the interest, payable annually. The obligation then resting upon him is to pay the purchase price of the land within the time required by the law and to pay the interest annually. If he defaulted in payment of the annual interest, and the State wished to rescind the purchase, what obligation under the law rested upon it in order to do so? Clearly to give the purchaser notice of its intention to rescind the sale and to proceed judicially to accomplish that end. When it offered the land for sale and Dolan entered into the contract, it said to him, If you default in payment of annual interest, the commissioner of the land office will notify the county or district attorney of the county in which the land is situated of your default, with statement of

the amount due, who will cause a "writ to be issued and served" on you to show cause why you should not be ejected, and, upon your failure to show that the annual installments of interest have been paid, a judgment shall be entered against you and a writ of possession for said land shall be issued in favor of the State. Did this provision of the law devolve any obligation upon the State before repossessing itself of the land and terminating the contract? Clearly so. It required a writ to be "issued and served upon the purchaser, or, in event of his death, upon his heirs or legal representatives, to show cause why he or they should not be ejected from the land. It placed upon the State the duty of proceeding through the courts to dispossess the purchaser. It secured to the purchaser the right to notice of the State's intention to rescind the contract, and an opportunity to be heard in the courts of the country before his rights in the land were taken from him. It deprived the State of an *ex parte* declaration of forfeiture and re-entry, and required that its declaration of forfeiture and re-entry should be through a judicial ascertainment and judgment of a court and a writ of possession. It secured to the purchaser a day in court. It was an agreement on the part of the State to waive its right of non-judicial rescission or "forfeiture." These agreements on the part of the State entered as much into the contract as did the agreement of the purchaser to pay the interest annually. It is a rule of construction that an instrument shall be considered as a whole, and that every clause and every word shall be given effect, and no part will be disregarded unless absolutely repugnant to the general intent (17 American and English Encyclopaedia of Law, 2nd edition, page 7). That one party is the State makes no difference as to the contract. The principles governing them are the same. "In so far as the mere property rights are concerned," says the supreme court of Texas in Jumbo Cattle Company *vs.* Bacon & Graves, 79 Texas, page 13, "we see

no difference between the contract of a State and an individual and a contract between two individuals. The formalities by which they are entered into may be different, but the principles affecting the two are essentially the same. *When there is an offer made by an act of the legislature, which is accepted by an individual, there is a contract, which it is not within the power of the State to impair.*"

Here was an offer by the State to sell the land upon certain *terms* and *conditions*. It prescribed all of them, and when the purchaser accepted it and entered into the contract he accepted all the terms, conditions, and provisions thereof. He is bound to observe and fulfill all the parts that exact an obligation or duty from him. Is not the State equally bound to observe and fulfill all the parts that exact a duty or obligation of it or confers a right or benefit on the other party?

It took the act of the two parties to make the contract. Can it be held that one of the two parties, without the knowledge or consent of the other, may abrogate any of the terms because it is a sovereign State? In the case of Fristoe *vs.* Blum, 92 Texas, 80, the supreme court of Texas in passing on a similar question and the relations and obligations of the contract of the State with an individual, quoted approvingly the rule announced in Peoples *vs.* Stepeens, 71 N. Y., 549, that:

"The State in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjudged upon the same principles as if both contracting parties were private persons. Both stand upon an equality before the law, and the sovereign is merged in the dealer, contractor and suitor."

Had the owner of a tract of land offered it for sale, and in the offer said to the intending purchaser, "I will sell this land to you for one dollar per acre, one-twentieth cash and the balance in twenty annual payments, with 8 per cent. interest, and you may pay me the whole or any part of it at any time, or defer any one or more of the payments until the whole is due, but you must pay the interest annually, and if you make default in the payment of annual interest and I elect to rescind, I will serve you with a writ and you shall show cause in a court why you should not be ejected, and if you fail to show that the annual installments of interest have been paid, judgment shall be rendered against you, and awarding writ of possession in my favor, and I will sell the land again," would it be held that the vendor could, without notice to the vendee and a judicial proceeding, rescind the sale and sell the land to another, so as to divest the vendee of his title or equity therein? Clearly not. If they had not contracted as to the method of effecting a rescission, the vendor might have exercised his common-law right, but having contracted for a rescission, to be made in a particular manner by judicial ascertainment, he is certainly bound by it. His obligation is to do just as he had agreed. The purchaser agreed to pay for the land in a certain manner and with interest annually; the State agreed to rescind the contract if he defaulted in payment of interest in a certain manner. If the obligation rested upon the purchaser to pay as he had contracted, did not the obligation also rest upon the State to rescind that purchase in the manner it had agreed or stated in the law it should be done?

"A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract" (Sturgis *vs.* Crowninshield, 4 Wheaton, 122).

In the case at bar the State agreed that before said Dolan or his vendees were deprived of their right in said land that they should be served with notice of the State's intention to rescind the contract; that they should have their day in court, and the forfeiture, if any, should be by the ascertainment and the solemn judgment of a court. This, then, constituted the obligation of the State's contract.

"What is it, then, that constitutes the obligation of a contract? It is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation must govern and control the contract in every shape in which it is intended to bear upon it, whether it affirms its validity, construction or discharge" (Ogden *vs.* Saunders, 12 Wheaton, 257).

If, as the Supreme Court says, section 12 was not a part of the contract between the State and purchaser, why did the legislature deem it necessary or proper to incorporate it in the act? If it had the right to rescind the sale without notice to the purchaser, why did it incorporate in the law a provision requiring notice to be given to the purchaser before a rescission was had, and giving him an opportunity to appear in court and show why such rescission should not be had? It is not to be presumed that the legislature put that section in the act without a purpose. If the State had its right to a rescission independent of and without section 12, it is not to be presumed that the legislature would, in minute detail, provide for a forfeiture to be had in a particular manner by a judicial proceeding, giving each step to be taken in so doing. It is a rule of construction that the legislature is presumed to have intended that every word and clause in a statute should be of some force and effect, and courts will so construe statutes that the whole may stand and be effective. "The great fundamental rule in construing statutes," says Judge Thompson in Ogden *vs.* Strong, 2 Paine, 584 (Federal case No. 10460)—

"is to ascertain the intention of the legislature. It is only in statutes of doubtful meaning that courts are authorized to indulge in conjectures as to the intention of the legislature or to look to consequences in the construction of a law. Where the meaning is plain, the act must be carried into effect by courts of justice, or they would be assuming legislative authority. It is a general rule of construction that every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonious, if practicable, and give a sensible and intelligible effect to each. It ought not to be presumed that the legislature intended any part of the statute should be without meaning, or without force and effect."

It would be doing violence to the act of the legislature to say that section 12 was without an object or purpose in it. Does not the whole act read together clearly show that it was the intention of the legislature, under the constitutional authority, to prescribe "regulations, time and terms" for the sale of the school lands, to enact a complete law providing for each step to be taken from the placing of the lands on the market to the remedy to be used in rescinding the sale in event of the purchaser's default in the payment of the purchase-money and interest? We think so. The people of Texas—the State—owned the lands, and had the right to say when and how and upon what terms and conditions they should be sold. The constitution authorized the legislature to determine the time and prescribe the "regulations and terms" for the sale of the land. The legislature did this, and, among other "regulations and terms," provided that in event of a default in payment of annual interest a "forfeiture" of the contract of purchase should be had through a judicial proceeding, and a re-entry should be by a judgment of court and a writ of possession. The law under which the purchase was made having so provided, did it not become a part of the contract? We think so.

The International Building & Loan Association *vs.* Hardy, 86 Texas, 615.

If a private individual should confer authority upon an agent to prescribe "regulations and terms" for the sale of his lands, and under the power so conferred the agent should prescribe as one of the "regulations" and "terms" that in case of default in the payment of annual interest a rescission or "forfeiture" of the contract should be had through judicial ascertainment and judgment of a court and re-entry by writ of possession, would it be contended for one moment that such *term* did not enter into and form a part of the contract? Certainly not. Why, then, should a different rule obtain when the vendor is the State?

The legislature, having provided for one method of "forfeiture," would by construction exclude any other, *expressio unius exclusio alterius.* The act having provided for a forfeiture by judicial proceedings, setting out particularly each step to be taken in the proceeding, providing what should be done by the commissioner of the land office, the district or county attorney, issuance and service of writ, the right of the purchaser to show cause, entering of judgment and issuing of writ of possession, making and transmitting a copy of the judgment to the commissioner of the general land office and endorsement to be made thereon, evidences beyond any question the intention of the legislature to require as a part of its offer to purchasers a forfeiture by judicial proceedings. This section exacted obligations of the State and conferred rights on the purchaser, and these obligations and rights enter into and form very material parts of the contract, in that the purchaser cannot be deprived of his rights in the land by an *ex parte* proceeding on the part of the State, but is given the right and opportunity to appear in court and show why such forfeiture should not be had. That such right would enter largely into the inducement to an intending purchaser cannot be doubted. From its presence in the law, the intending purchaser in reading its provisions to determine his rights thereunder in the event of purchasing would understand that before his

purchase could be forfeited he would be given notice of the State's intention thereof and have an opportunity to be heard and his equities adjusted before his contract was canceled and annulled by the State.

Section 12, then, became a part of the contract, and it cannot be taken away by any subsequent legislation. In disposing of the question of an offer to sell its land and acceptance thereof by a purchaser, the supreme court of Texas, in Jumbo Cattle Company *vs.* Bacon & Graves, 79 Texas, 13, say:

"When there is an offer made by the legislature which is accepted by an individual, there is a contract which it is not within the power of the State to impair."

That it was the intention that section 12 should be a part of the contract we think is also evident from the provisions of the obligation, wherein the purchaser binds himself in the following words:

"And it is expressly understood that I am to comply with all the conditions and requirements and am subject to all penalties contained and prescribed in the above-recited act" (Rec., p. 5).

The only penalties prescribed by the act to which the purchaser could be subject is that of forfeiture for default in the payment of annual interest. Then if he is to be subject to the penalties contained and prescribed in said act, said obligation by express terms makes section 12 a part of said contract, and the forfeiture or rescission to be exercised in the manner therein prescribed.

Looking to the entire act, its purposes and the evident intention of the legislature and the terms of the application, receipt for first payment, and the obligation, we submit that section 12 entered into and formed a part of the contract between the State and the purchaser and his vendees.

AUTHORITIES.

Laws of Texas, Special Session 1879, page 26.
Laws of Texas 1881, page 119.

The above two acts of the legislature are printed in full in the appendix hereto.

Fletcher *vs.* Peck, 6 Cranch, 87.
Woodruff *vs.* Trapnall, 10 Howard, 190.
Winter *vs.* Jones, 10 Ga., 190.
International Building & Loan Association *vs.* Hardy, 86 Tex., 615.
State *vs.* Commissioners of School Lands, 4 Wis., 414.

II.

THE ACT OF THE LEGISLATURE OF TEXAS, APPROVED MARCH 25, 1897, AUTHORIZING THE COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS TO FORFEIT AND RESCIND WITHOUT JUDICIAL PROCEEDINGS "ALL LANDS HERETOFORE SOLD BY THE STATE UNDER ANY OF THE VARIOUS ACTS OF THE LEGISLATURE FOR FAILURE TO PAY ANY PORTION OF THE INTEREST" IS IN CONTRAVENTION OF SECTION 10, ARTICLE I, OF THE CONSTITUTION OF THE UNITED STATES, AS IMPAIRING THE OBLIGATION OF THE CONTRACT ENTERED INTO BY THE STATE WITH SAID THOMAS DOLAN, BECAUSE SECTION 12 OF THE ACT OF JULY 8, 1879, UNDER WHICH HE PURCHASED SAID LAND, PROVIDES FOR AND REQUIRES FORFEITURE OR RESCISSION BY JUDICIAL ASCERTAINMENT AND PROCEEDINGS.

The forfeiture or rescission of the Dolan purchase was made under and by virtue of the act of the legislature of Texas approved March 25, 1897 (Rec., p. 6). That act is as follows:

"An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State under any of the various acts of the legislature, for failure to pay any portion of the interest thereon.

"SECTION 1. *Be it enacted by the legislature of the State of Texas*, That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, university or any of the other various State institutions, has not been paid, it shall be the duty of the land commissioner to endorse on the obligation for said lands, 'lands forfeited,' and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right, at any time within six months after such endorsement of 'lands forfeited,' to institute a suit in district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; provided, that if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

"This act is cumulative and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase-money or possession of the land so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the State."

Acting under the authority conferred upon him by this act, the commissioner of the general land office forfeited said purchase on August 20, 1897, by endorsing upon said Dolan's application "land forfeited," and declared said land forfeited to the State without the "necessity of re-entry or judicial ascertainment," and reclassified the land and placed it upon the market for sale (Rec., p. 6). No judicial proceeding of any kind was had prior to the entry of said forfeiture, and no notice of any kind was given said Dolan, his vendees, or the beneficiaries or mortgagees in said mortgage of the State's intention to rescind said sale (Rec., p. 6). After said forfeiture the land was sold by the State to J. F. Standefer, defendant in error (Rec., p. 7), and he, under said purchase, is claiming the right to recover the title and possession thereof from plaintiff in error, who claims under the Dolan contract. Whether defendant in error has a title superior to that of plaintiff in error depends upon whether the legislature could change the remedy for the forfeiture, as provided in section 12 of the act of July 8, 1879, under which said Dolan purchased.

The question of the right of the State of Texas to rescind or forfeit purchases of school land by virtue of acts passed subsequent to such sale first came before the supreme court of Texas in Fristoe *vs.* Blum, and that case involved the right to forfeit purchases made under the act of 1883, which in express terms authorized a non-judicial forfeiture. The forfeiture clause in the act of 1883 was repealed by the act of 1885, and from that time to the act of 1887 there was no law authorizing a forfeiture for failure to pay annual interest. The act of 1887, by section 11, authorized a forfeiture of purchases made under former laws, and, acting under that provision, the commissioner of the land office forfeited the purchase under which Blum held, and Fristoe purchased said land. In a suit between them the validity of said forfeiture was called in question and the court of civil appeals held it invalid (Blum *vs.* Fristoe, 42 S. W., 656). On writ of

error the supreme court of Texas reversed the court of civil appeals, 92 Texas, 76, and held that the State had the right by subsequent acts of its legislature to authorize the forfeiture or rescission of such sales, that part of the decision relating to the right to rescind being as follows:

"But it is said that a construction of section 11, which would give to the commissioner of the general land office the authority to re-enter and forfeit as in this case would render the act unconstitutional because it would be giving to it a retroactive effect by which it would violate the obligation of the contract. A sufficient answer so far as this case is concerned, to that proposition, would be that this contract was entered into when such a law existed, and provided for the doing of the very thing that the commissioner has done, and the repeal of that law could not constitute on the part of the State an obligation that it should not be restored in the future. We prefer, however, to put this decision upon the broader ground and stronger position that where a right exists, the legislature may give a new remedy provided it does not deprive either party of a substantial right."

The position of the court being that the State as a vendor of land has the right to change the remedies provided in its contract for rescissions of such sales, provided it does not deprive either party of a substantial right; that when the State sold the land it had the right of rescission independent of any contract, and, notwithstanding it contracted how that right should be exercised, it had the right to change it without the consent of the other contracting party, because it had the right without or in the absence of any contract to rescind the sale on breach of the contract. True the State, like any other vendor, in the sale of land would have the right to rescind the sale upon the breach of the contract, but the State, also like any other vendor, has the right to enter into a contract limiting and prescribing how its right of rescission shall be exercised. When it does so, it is as much bound by that contract as a private vendor would be. If private persons in sale of real estate enter into a contract

prescribing how a vendor shall rescind the sale in the event of the vendee's breach of the contract, it would not be contended for a moment that the vendor could substitute another and different method, substitute an *ex parte*, for the judicial rescission contracted for. It is true that in making the contract they might have remained silent as to the method of the rescission, and in that event resorted to a non-judicial forfeiture, but having by the contract provided for a judicial forfeiture, they cannot be heard to change that remedy without the consent of the other contracting party. The remedy then becomes as much a part of their contract as any other provision in it. When parties to a contract provide that upon default by one the other shall resort to a given remedy, that remedy becomes a part of the obligation of the contract, and it is not in the power of the legislature to change, modify, or substitute another remedy for it. "It is obviously true that such remedy as rests on contract alone," says the supreme court of Texas—

"must be exercised as provided by the contract, or not at all; and it is equally clear that the legislature has no power to change such a contract, and in its changed condition make it obligatory on either party, simply because it has no power to make contracts for parties."

The International Building & Loan Association *vs.* Hardy, 86 Texas, 615.

In that case a deed of trust with a power of sale, to be exercised in the event of default in payment of the debt secured, provided that the sale should be made in a county other than the one in which the land was situated. Subsequent to the execution of that deed of trust the legislature of Texas passed an act requiring all sales made under powers contained in any deed of trust to be made under certain formalities and in the county where the land was situated. The supreme court of Texas held the act unconstitutional as to deeds of trust made prior to its passage, because it impaired the obligation of the contract. How much

stronger is the reason when the remedy contracted for is judicial, as in the case at bar? When parties, by their contract, have said that a breach thereof should be remedied through the courts of the country, neither party can, without the consent of the other, substitute a non-judicial remedy. If this is true as between private persons it is equally true as between the State and one of her citizens. The same law that governs the subject governs the sovereign.

It is also true that parties have the right to make remedies the subject of their contract, and, when they do, it is as much protected against impairment as any other provision of the contract. This right is so tersely stated by the supreme court of Pennsylvania in Bellmeyer *vs.* Evans, 40 Pa. St., 327, that we here quote from it:

"A statute strictly remedial may impair the obligation of a contract; and when this happens the act is unconstitutional" (Bronson *vs.* Kinzie, 1 Howard, 322). "This always happens where the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves and the legislature must let them alone. Stay law, exemption laws, and limitation law are ordinarily constitutional, although applied to existing and prior contracts; but the cases in which such laws have been sustained have been cases in which the parties have not contracted about the subject-matter to which the laws were applicable. * * * If the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by a particular contract, it is plain that as to the parties to that contract the law is unconstitutional and void, because it impairs the obligation of their contract."

In the case at bar the parties have expressly excluded a non-judicial forfeiture, by providing in express terms and minute detail for a judicial forfeiture. Having provided

the rule of remedy in their contract, the State could not substitute another.

The error into which the supreme court of Texas has fallen is in attempting to apply to the case at bar the rule that the legislature has the right to modify, alter, or change its judicial remedies. It will not be denied that the legislalature has control over its judicial remedies and may change them at her pleasure. The "remedy" which the State has the right to change refers to those modes of procedure in the courts which lead up to and end in the judgment and its execution (Johnson *vs.* Fletcher, 54 Miss., 628). It does not and cannot refer to those modes of procedure—those remedies, which the parties in their contracts have agreed should be resorted to for the enforcement of their rights in the event of a breach of the contract. One arises out of and is furnished by the law and exists independent of the contract; the other arises out of and is furnished by the contract.

"We have often said" (says the supreme court of Pennsylvania in Breitenbach *vs.* Bush, 44 Pa. St., 313), "that stay laws, exemption laws, and limitation laws are ordinarily constitutional, though applied to existing and prior contracts, and we have followed the distinction which prevails in the Supreme Court of the United States, between the obligation of the contract and the remedies furnished by law for enforcing the obligation. We understand the rule to be, that whilst the legislature may not impair the obligation, they may modify the remedy. But it sometimes happens that the parties contract concerning the remedy—that they stipulate in the body of the contract that in case of failure of payment by a certain day, there shall be no stay of execution, or that the mortgagee may enter and sell the mortgaged estate—or that all exemption rights shall be waived. In such cases, the rule is, that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional."

Section 12 of the act of 1879 did not, by name, designate any particular character of action, but simply provided for a forfeiture by judicial proceeding, requiring a judicial ascertainment after notice to the purchaser, before decreeing a forfeiture and requiring re-entry to be made through a writ of possession issuing out of a court. The act of March 25, 1897, undertakes to substitute for this judicial remedy an *ex parte* proceeding by which the commissioner of the land office, without resorting to any court—without notice to the purchaser, without his knowledge or consent, by an endorsement made by him upon the purchaser's obligations, declares his contract of purchase canceled and annulled, his rights in the lands "forfeited" or rescinded "without the necessity of re-entry or judicial ascertainment." The supreme court of Texas say that the legislature had the right to substitute this remedy in lieu of the remedy specially provided in the contract, because the State had the right of rescission independent of the contract, and had the right to change the remedy, provided it did not deprive either party of a substantial right, and in support of their position cite two Texas cases—*i. e.*, Sutherland *vs.* De Leon, 1 Texas, 305, and Johnson *vs.* Taylor, 60 Texas, 362.

We submit that neither of those cases is authority for or applicable to the position taken by the court. In the case of Sutherland *vs.* De Leon, the question involved was as to whether the State could provide for the judicial proceeding by attachment when that remedy did not exist before, and whether the remedy would be applicable to causes of action accruing prior to its passage. The court held that the legislature could provide such remedy, and that it was applicable to causes of action accruing prior to its enactment without being subject to the prohibition of the Constitution against retrospective laws. The only question, then, which that case decides is that the State has the right to provide judicial remedies, and that parties in the enforcement of their rights can use those remedies, whether their rights accrued prior

or subsequent to the enactment of the remedy. This doctrine is elementary.

In the case of Johnson *vs.* Taylor the action was brought against the heirs of Amanda McDonald to correct by judgment a certificate of acknowledgment, which was alleged to have been properly made but defectively certified, to a deed by which it was alleged that Amanda McDonald had sold and conveyed land which she owned in her separate right. By the laws of Texas a married woman could convey her separate property only by being joined by her husband, and by her privy examination before the proper officer and by her declaration to him that she had willingly signed and delivered the instrument and did not wish to retract it. It was alleged that the acknowledgment was properly made, but the officer in making his certificate thereof had done so defectively, and the certificate did not show those requisites of the law required to constitute a valid conveyance. Subsequently the legislature passed a law which provided that—

"Where the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate."

The purpose of the act was not to make a new contract for the parties or to change that made by them, but by a proper proceeding through the courts to correct the omission of the officer. It related only to the acts and omissions of the officer. It provided a remedy only where the "acknowledgment was properly made," but "defectively certified." The court held that this remedy was applicable to instruments executed and acknowledged prior to the time the act in question was passed. The effect of the decision is to hold that the State has the right to provide legal remedies for the enforcement of rights, whether those rights accrue prior or subsequent to the passage of the act creating the remedy. This, too, is elementary.

But how are these cases authority for the decision in this case, that when the act under which the purchase was made in express terms provided for a judicial forfeiture the legislature can by a subsequent act authorize a non-judicial forfeiture? The right secured by the law under which the purchase was made was a judicial forfeiture—a notice of the intention to forfeit and the ascertainment by a judicial trial of the facts which would authorize the forfeiture—a re-entry by a writ of possession. When the legislature, by the act of March 25, 1897, authorized a forfeiture by a simple declaration and entry by the commissioner of the general land office, without the necessity of re-entry or judicial ascertainment, and the commissioner so declared the forfeiture, it acted directly upon and destroyed the rights secured by the act under which the purchase was made. It acted directly upon and changed the obligation of the State to the purchaser. Can the State do this under pretence of change of remedy? We think not.

"The obligation of the contract" (says the Supreme Court of the United States in McCracken *vs.* Haywood, 2 Howard, 608) "consists in its binding force on the party who makes it. This depends on the law in existence when it is made: those are necessarily referred to in all contracts, and forming a part of them as a measure of the obligation to perform them by one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning: when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affects to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

If the general law of the State prescribing remedies enters into and forms a part of all contracts, how much stronger is the case where the very act by virtue and under which the contract is made prescribes the remedy to be used on its breach?

"While the legislature has power" (says the supreme court of Texas in Loan Association *vs.* Hardy, 86 Texas, page 616) "to prescribe what process shall be used for enforcement of rights through the courts, and what notice of judicial sales shall be given, it certainly has no power to confer on any private person, power to sell the property of another at such time and place and on such notice as it may prescribe, without regard to, or in violation of any contract parties may have made."

In that case a deed of trust was made on April 18, 1885, containing a power of sale to be exercised in a certain manner on default in payment of the debt. Subsequently, on March 21, 1889, the legislature passed an act requiring all sales thereafter made under the powers contained in any deed of trust to be made in the county where the land was situated, and required notice and sale to be made as in cases of sheriff's sales under the then existing law. The deed of trust authorized the sale without those formalities, and on October 9, 1890, sale was made of the mortgaged premises in accordance with the powers prescribed in the deed of trust. In a contest between the mortgagor and purchaser at such sale, the trustees' deed was objected to because the sale was not made in the manner required and in accordance with said act of March 21, 1889, and the supreme court held said act unconstitutional as impairing the obligation of the contract, and in a very able opinion by Chief Justice Stayton, since deceased, says in concluding the opinion:

"When parties, looking to all the facts bearing on their respective interest make a contract whereby specific remedy, not given by law is secured for enforcement of rights, courts ought not to inquire as to the extent of injury which may

result if a law subsequently enacted and affecting the remedy, be given effect; for such legislation impairs the obligation of the contract, takes away vested rights, and is therefore prohibited by the Constitution."

Parties can contract that their rights and liabilities shall be settled and determined through the courts, and if they do so contract does it not exclude the right to settle them without judicial proceedings? When authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded (Sutherland Stat. Con., sec. 326).

In the sale of school land in Kansas the law provides that when default is made in payment of the purchase-money or interest the purchaser shall have sixty days' notice of the State's intention to declare a forfeiture. The supreme court of that State, in Hanson *vs.* Wilson, 19 Pac. Rep., 717, holds that a valid forfeiture cannot be had without giving that notice.

In case of The State *vs.* Commissioner of School and University Lands, 4 Wis., 414, it was held that where by statute a purchaser of lands from the State had the right upon the forfeiture of his contract of purchase for the non-payment of the sum due upon it to revive it at any time before a public sale of the lands by the payment of all sums due upon the contract, with a penalty of 5 per cent., this right could not be taken away by a subsequent change in the law which subjected the forfeited land to private entry and sale.

In the case of Schilling *vs.* The State, 2 Texas Civil Appeals, 582, which was a suit brought by the State under section 12 of the act of 1879 to declare a judicial forfeiture of land purchased under that act, the court of civil appeals says:

"Although the act declares that upon the failure of the purchaser to show that the annual installments of interest have been paid as provided, judgment should be rendered against him, we do not think that the proviso does more

than to require the payment of the money in the manner prescribed before the case is called for trial. The object of the statute was to sell the land and provide a fund for the common schools, and this purpose is made manifest by the subsequent laws declaring that there shall be no forfeiture for non-payment of the principal, and extending from time to time the payment of interest. It was no doubt the intention of the legislature in requiring the forfeiture to be ascertained in the district court to afford the purchaser the opportunity of obtaining such equitable relief as he might show himself to be entitled to; and a familiar principle of relief belonging to equity is, that the vendee be allowed to complete his purchase by payment of the balance of the purchase-money and interest."

We think this a clear interpretation of section 12, and it certainly comports with sound reason and the rules of equity applicable to the relations of vendor and vendee.

It will be noticed that the several courts of civil appeals of Texas, wherever the question came before them prior to the decision of the supreme court in Fristoe *vs.* Blum, 92 Texas, 76, uniformly held that the acts of the legislature of Texas authorizing summary forfeitures were not applicable to sales made previous to the passage of such acts.

Blum *vs.* Fristoe, 42 S. W. Rep., 656 (3d district).
Cuba *vs.* Island City Savings Bank, 41 S. W. Rep., 532 (4th district).
Capps *vs.* Garvey, 41 S. W. Rep., 378 (2d district).
Sims *vs.* Wright, 56 S. W. Rep., 110 (4th district).

The last case (Sims *vs.* Wright) was decided by the court of civil appeals of the fourth district subsequent to the decision of the supreme court in Fristoe *vs.* Blum and the case at bar, the question involved being the identical question now before the court in this case. While the court of civil appeals was bound by the decision of the supreme court, they enter their dissent in such a forcible manner and able

opinion by Justice Fly that we beg to quote at length from it:

"But one question is presented by the record" (says the court), "Did the declaration of forfeiture by the commissioner of the land office deprive appellant of any rights or equities he had in the land by reason of the numerous payments he had made and the improvements he had placed on the land? The supreme court has answered the question in the affirmative in at least three instances, one of very recent date (Fristoe *vs.* Blum, 92 Texas, 76; Waggoner *vs.* Flack, 51 S. W. 330; Standefer *vs.* Wilson, 54 S. W., 898). Doubtless it is the duty of this court to be governed by the decisions cited, but in doing so we deem it just to ourselves to respectfully but earnestly protest against some of the theories advanced in them. It is admitted in the leading case, and reiterated in the last case above cited, that the State occupies in cases of this character, no higher vantage ground than that occupied by an individual; in other words, that the statute authorizing a forfeiture of land sales without judicial ascertainment gives no rights to the State that it did not already possess, and that is possessed by any other vendor of land when there is default in payment in any of the purchase-money. We quote from Fristoe *vs.* Blum:

"'This assertion of the paramount title in the State was no more a "forfeiture" than it would have been if Bennick had bought the land from an individual, who, for the same reason declared a rescission of the sale.' This ruling is fully endorsed in the late opinion of Justice Williams in the case of Standefer *vs.* Wilson. The effect of the declaration is to hold that a vendor of land, no matter what part of the purchase-money has been paid by the vendee, nor how valuable improvements he may have erected on the land, has the absolute right, if any part of the purchase-money remains unpaid, to rescind the contract of sale and take possession of the land, independent of any judicial ascertainment of the rights of the respective parties. This we do not understand to be the law of Texas.

"If an individual should have the authority, and exercise it of rescinding a contract for the sale of land without judicial ascertainment, the vendee, if the vendor should be solvent, might sue, and obtain his equities; but even this would

be denied in case of a sovereign State, which could not be sued, and the vendee is left with no redress. The proposition that the State, by confiscatory legislation or otherwise, can perpetuate such irremedial wrong upon the citizen, is, to our minds, an utterly untenable proposition. In the law under which appellant made his purchase, it was provided that any forfeiture of the contract must take place in the courts of the State, and we believe this clause of the statute entered into and became a part of the appellant's contract, and that the State cannot do away with that part of the contract by declaring that a judicial proceeding should not be necessary. A large portion of the opinions in the case of Standefer *vs.* Wilson is taken up in the endeavor to show that the section of the law in question did not enter into the contract for sales of land under the act of July 8th, 1879. It is settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

U. S. *vs.* Quincy, 4 Wall., 535.
Louisiana *vs.* City of New Orleans, 102 U. S., 132.
Association *vs.* Hardy, 86 Texas, 610.

"The change made in the law of 1879 by the act of 1897 is not one merely of a change of procedure in the courts, but it is a wresting from the purchaser of land, the right to be heard in the courts at all. This right if not guaranteed to him by the Constitution, was given to him by the law which formed a part of his contract. To summarize, we do not think that the State or any individual has any authority in law to declare a contract for the sale of land forfeited or rescinded regardless of the equities possessed by the vendee, and if it ever had such authority, it contracted it away in the law under which the land in this case was bought."

It would be difficult to present more forcibly the propositions in this case than in the language of Justice Fly above quoted, and his conclusion that section 12 of the act of July 8, 1879, entered into and formed a part of the purchaser's con-

tract being true, it irresistibly follows that the act of March 25, 1897, and the forfeiture declared thereunder by the commissioner of the land office is void, being in violation of section 10, article 1, of the constitution of the United States, as impairing the obligation of that contract.

From the latter part of section 1 of the act, March 25, 1897, it is evident that the purpose of the State was not to withdraw the right of judicial forfeiture, but to add thereto the right of non-judicial forfeiture, for in that act they say, "This act is cumulative and is not intended to deny to the State the right to institute any legal proceedings that may be necessary to secure the purchase-money or possession of the land so sold," and in the same section the purpose is clearly declared to make the act applicable to all purchases made at any time and under the law, and they further say:

"This act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the State."

The necessity or purpose of the act of March 25, 1897, is clearly shown by the second section of the act, usually termed the emergency clause, in which it appears that the power and authority of the commissioner of the land office to make forfeitures without judicial ascertainment had been questioned, and the very object and purpose of this statute was to remove any question about that power, and if it was lacking in the laws under which the purchase was made, then it was the purpose of this act to supply it. It further appears from that section that one of the purposes for authorizing a non-judicial forfeiture was because there were so many purchases that could be forfeited for non-payment of interest due thereon, and that it is—

"almost impossible and certainly impracticable to institute so many different suits against so many different purchasers."

It, indeed, was strange that the legislature should have assigned this as a reason for changing the contract if that contract required a forfeiture by suit, and it was their evident purpose by this act to bring all purchases within its purview and to make it applicable, whether it impaired the contract or not.

If we should apply to this case the rule announced by the Supreme Court in Fristoe *vs.* Blum—

"That where the right exists, the legislature may give a new remedy provided it does not deprive either party of a substantial right"—

we think an inspection of the law under which the purchase was made would exclude the right of a non-judicial forfeiture, for by section 12 of the act of July 8, 1879, if the State elected to forfeit the contract for failing to pay the annual installment of interest, she was required to serve the purchaser with notice of such intention. Can it be said that the right to actual personal notice of the intention to terminate a contract is not a substantial right? It gave to the purchaser the right to be heard in the courts of the country before forfeiture could be had. Can it be said that the right to a day in court is not a substantial right? It conferred the right to declare a forfeiture only through the judicial branch of the Government and by the solemn judgment of the court upon an ascertainment of the facts which authorized it. Can it be said that this was not a substantial right? It gave to the purchaser an opportunity to show that the annual installment of interest had been made. Can it be said that this was not a substantial right? It gave to him an opportunity to urge and have adjusted any equity which he might have by reason of payments or improvements. Can it be said that this was not a substantial right? When the State served him with notice of her intention to claim a forfeiture it gave the purchaser an opportunity to pay up the annual installments of interest and save forfeit-

ure (Schilling *vs.* The State, 2 Texas Civil Appeals, 582). Can it be said that this was not a substantial right? It gave to the purchaser the right to the time between service of notice and the entering of judgment in which to raise the money and comply with his contract as to payment of interest or payment of both principal and interest (Moore *vs.* Giesecke, 76 Texas, 551). Can it be said that this was not a substantial right? All of these rights were secured to the purchaser by his contract and may have been the inducement that led him to buy the land. By the act of the legislature authorizing the forfeiture without judicial ascertainment he was deprived of all of those rights, and the power of declaring a forfeiture was transferred from the judicial to the executive branch of the government.

AUTHORITIES.

Acts of 1879, Special Session, p. 26.
Acts of 1881, p. 119.
Acts of 1897, p. 39.

The above acts are printed in full in the appendix hereto.
Bronson *vs.* Kinzie, 1 Howard, 311.
McCracken *vs.* Hayward, 2 Howard, 608.
United States *vs.* Quincy, 4 Wallace, 535.
Brine *vs.* Hartford F. Ins. Co., 96 U. S., 627.
Edwards *vs.* Kearzy, 96 U. S., 595.
Seibert *vs.* United States, 122 U. S., 284.
Barnitz *vs.* Beverly, 163 U. S., 119.
Bellmeyer *vs.* Evans, 40 Penn. St., 327.
Breitenbach *vs.* Bush, 44 Penn. St., 313.
St. *vs.* Commissioner of School Lands, 4 Wis., 414.
International Building and Loan Association *vs.* Hardy, 86 Texas, 615.
Sims *vs.* Wright, 56 S. W. Rep., 110.

III.

THE COURT OF CIVIL APPEALS FOR THE THIRD JUDICIAL DISTRICT OF TEXAS ERRED IN SUSTAINING AND AFFIRMING THE ACTION OF THE STATE OF TEXAS THROUGH ITS COMMISSIONER OF THE GENERAL LAND OFFICE, EXERCISED UNDER AND BY AUTHORITY OF THE ACT OF THE LEGISLATURE OF TEXAS APPROVED MARCH 25, 1897, IN FORFEITING, CANCELING, AND ANNULLING, WITHOUT JUDICIAL ASCERTAINMENT AND PROCEEDINGS, THE CONTRACT OF PURCHASE ENTERED INTO BETWEEN THE STATE OF TEXAS AND THOMAS DOLAN, UNDER WHICH PLAINTIFF IN ERROR CLAIMED, BECAUSE SAID ACT AND THE ACTION OF THE COMMISSIONER OF THE LAND OFFICE THEREUNDER WERE IN VIOLATION OF SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES, AND IMPAIRED THE OBLIGATION OF SAID CONTRACT, AND DEPRIVED PLAINTIFF IN ERROR OF VESTED RIGHTS WITHOUT DUE PROCESS OF LAW; AND SAID COURT OF CIVIL APPEALS ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT OF TOM GREEN COUNTY, RENDERED IN FAVOR OF PLAINTIFF IN ERROR, AND RENDERING JUDGMENT IN FAVOR OF DEFENDANT IN ERROR.

On the trial of the cause in the district court of Tom Green county, judgment was rendered in favor of plaintiff in error, and ordering that defendant in error take nothing by his suit (Rec., p. 9), the trial court holding that said forfeiture was in violation of article 1, section 10, of the Constitution of the United States (Rec., pp. 11 and 15). From this judgment defendant in error appealed to the court of civil appeals (Rec., p. 9), which reversed the judgment of the district court and rendered judgment against plaintiff in error and in favor of defendant in error for the land in controversy and awarded a writ of possession (Rec., p. 21), thus affirming the validity of said act of March 25, 1897, and the forfeiture thereunder.

The record shows that the purchaser and his vendees paid in principal and interest on said land the sum of $304.65 (Rec., p. 5); that said land, with others, was mortgaged to the Knickerbocker Trust Company for a large sum of money by the Ostrander and Loomis Land and Livestock Company (Rec., p. 6), which company acquired title to said land April 4, 1888 (Rec., p. 5); that said Ostrander and Loomis Land and Livestock Company became insolvent in 1892 and was unable to meet any of its obligations (Rec., p. 6); that thereafter judgment of foreclosure was entered on said mortgage in the district court of Tom Green county on the 17th day of May, 1898 (Rec., p. 6), and said land was sold under said judgment of foreclosure by the sheriff of Tom Green county on July 5, 1898, and bought in by plaintiff in error, with other lands, for the sum of $3,250, which was paid and proper deed made to him (Rec., p. 6); that the forfeiture of said land was had August 20, 1897 (Rec., p. 6), and after the purchase by plaintiff in error under said foreclosure sale, on, to wit, April 25, 1899, he tendered to the State the full amount of the balance of purchase-money and interest due on said land, which its State treasurer refused to accept, because said purchase under which plaintiff in error claimed had been forfeited, and for the same reason the commissioner of the land office refused to issue a patent (Rec., p. 8). At the time of the forfeiture the State did not pay or offer to pay back any part of the principal or interest paid on said land by Dolan or his vendees, and has not since paid or offered to pay the same or any thereof, and the obligation of said Dolan has not been returned or offered to be returned, but the same is still retained by the State treasurer (Rec., p. 8).

Plaintiff in error was in possession of the land under his purchase at foreclosure sale, and defendant, claiming under his purchase made after entry of said forfeiture, brought this suit to recover from him the title and possession of said land (Rec., p. 1). Under this state of case, we submit that de-

fendant was not entitled to recover, and that the judgment of the district court of Tom Green county holding said forfeiture void as being in violation of section 10, article 1, of the Constitution of the United States as impairing the obligation of the contract was correct, and the court of civil appeals erred in reversing that judgment and giving effect to the act of March 25, 1897, and the action of the commissioner of the land office thereunder.

CONCLUSION.

Viewed in the light of the former decisions of the courts of Texas on questions of rescission, the opinion of the supreme court in this cause seems to be a strange inconsistency. The doctrine of non-judicial rescission has never been favored, and it has been only in strong instances where the courts have upheld the right to resort to this remedy. The rule, as applicable in this State, was very clearly announced by Associate Justice Henry in the case of Moore *vs.* Giesecke, 76 Texas, page 551, in the following language:

"The remedy by rescission is not favored, and, as has been said, slight circumstances, when they may be properly treated as indicative of a purpose upon the part of the vendor not to insist on that remedy, may be treated as a waiver of the right to rescind, unless its maintenance became necessary to enable the vendor to enforce the payment of the consideration for which he contracted to sell the land; and when a suit for the recovery back of the land has been brought, where any portion of the purchase-money has been paid, or where valuable and permanent improvements have been placed upon the land by the vendee, or by purchasers under him, and the defendant when sued brings into court and offers to pay the balance of the purchase-money with costs of suit, unless there exist strong countervailing equities, the money ought to be received and a recovery of the land denied."

From this statement of the rule, it is, we think, clear that had any suit been brought between private individuals

under such a contract as that claimed by plaintiff in error, and he paid or tendered the full amount of the purchase-money and interest due under the obligation given for the land, that he would have been entitled to a recovery and the rescission would have been denied. In this case the defendant in error occupied the position of the State and sought a recovery of the land under the non-judicial rescission declared by the commissioner of the general land office, acting under the act of March 25, 1897, and if, under the rule announced in the above case, the State by judicial proceedings would not have been entitled to recover the land after full tender of the purchase-money by plaintiff in error, then certainly the defendant in error in this case had no right to recover.

Doubtless the legislature by incorporating section 12 in the act of July 8, 1879, did so in recognition of the general tenor of the decisions of the courts of this State as being averse to non-judicial forfeitures, and therefore provided for a judicial forfeiture as being more equitable and just to the purchaser or his vendees. In the opinion of the supreme court of this State (see Rec., p. 18), the court say that the statute of 1879 did not give

"authority to any officer to rescind without judicial action, but the right of rescission existed in the State, and its exercise might be subsequently authorized through the law-making power, and an exercise of it, based upon the default of the other party would not be a denial of any right of his."

In this the court clearly recognizes that by the act of 1879 the only forfeiture that could be had would have been a judicial one, that being the forfeiture authorized by that act. This being true, there was no authority for a forfeiture until the act of March 25, 1897, which was passed, as declared by the act itself, because it was "almost impossible and certainly impracticable to institute so many different suits against so many different purchasers." Then the purpose was to avoid

the inconvenience of complying with the contract and forfeiting the land through a suit. In other words, to save the expense and the inconvenience the legislature would overturn the constitutional guaranty and substitute a non-judicial forfeiture. What would be thought of such a proposition as coming from one individual to another, who had made a contract providing for a certain remedy in the event of breach of its performance, to say that it was inconvenient for him to perform the same, that it was impossible or impracticable to enforce the contract in accordance with its terms and provisions, and therefore he would substitute another to his liking that would be more convenient or more practicable.

The supreme court in the same paragraph announced another singular doctrine, and that is that—

> "It could be only held that the right of such rescission for default of the purchase did not exist by holding that the contract provided that it should not exist or that it should be exercised in a particular manner."

By this the court means to say that to have excluded the right of the State to a non-judicial forfeiture section 12 should have provided in negative terms that no remedy should be resorted to other than a judicial one. We are at a loss to know how the court arrived at such conclusion. It is true a negative term might have been placed in the contract, but it certainly does not follow that when parties have expressed in unequivocal language what their contract is, because they have not by negative terms said that it should not be something else, that it therefore follows that either party might have changed it and enforced it as containing provisions other than those expressed in the contract. It is to be presumed that when the parties in express terms stipulated for a certain remedy on breach of the contract that they meant for that remedy to be used. It certainly would be contrary to reason and common sense that they could have

intended that one of the parties might have substituted another remedy. If a party should make a deed of trust with power of sale, to be exercised on default in payment of the debt by a public sale before the court-house door, the trustee certainly could not make a private sale at some other place because it was more convenient or more practicable, without the consent of the mortgagor. If we apply the rule announced by the court in the case at bar, then such change would be lawful unless the parties had by express and negative terms excluded it; that having provided in the contract for it to be done in a certain way it might be done in some other way, because such other way was not expressly excluded—this, we submit, is not sound law, and the legislature in attempting to authorize a non-judicial forfeiture, in so far as it was applicable to purchases made under the act of July 8, 1879, was illegal and void and in contravention of section 10, article 1, of the Constitution of the United States.

We respectfully submit that the judgment of the court of civil appeals, in sustaining and affirming the validity of the authority exercised by the State of Texas by and through its commissioner of the general land office in forfeiting, canceling, and annulling the contract entered into between the State of Texas and Thomas Dolan, under which the plaintiff in error claimed, and in reversing the judgment of the district court rendered in favor of plaintiff in error, committed an error, and we respectfully ask that the judgment of said court of civil appeals be reversed and the judgment of the district court of Tom Green county be in all things affirmed.

JARED W. HILL,
Counsel for Plaintiff in Error, T. K. Wilson.

APPENDIX.

Act of July 8, 1879.

Chapter XXVIII.

An act to provide for the sale of the alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common-school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith.

Section 1. *Be it enacted by the legislature of the State of Texas*, That all the alternate sections of land in organized counties heretofore surveyed, or which may be hereafter surveyed by any railroad company or other work of internal improvement and set apart for the benefit of common schools, shall be brought into market and disposed of in the manner hereinafter provided.

Sec. 2. The county surveyor of the county in which said lands are located shall view and appraise the same, under oath, and make return of the same to the county commissioners' court, which court shall examine, approve or disapprove of the same, and may take other evidence to ascertain the true value of the land, and, in case of disapproval said court shall fix a value thereto, and the valuation of said lands, in no case, shall be less than one dollar per acre. County surveyors acting as appraisers of lands in their respective counties shall each receive the sum of one dollar per section, and in no event to exceed fifty dollars for the appraisement of all the lands in any one county, to be paid out of the proceeds of the first sale of land under the provisions of this act. Any person having improvements upon any of such lands, prior to the taking effect of this act, shall have the preference in the purchase thereof for the period of six months next after taking effect hereof, at the valuation exclusive of the value of such improvements.

SEC. 3. That as soon as the appraisement is completed, the county commissioners' court shall prepare tabulated reports of their action setting forth the following, viz: Number of survey, block, quantity in each survey, name of company or individual to whom the certificate was granted, price per acre of each section or quarter thereof, if differences exist, value of improvements, remarks giving general description of soil and water. One copy of the above report shall be filed in the office of the county surveyor, and shall constitute an archive of his office. One copy shall be forwarded to the commissioner of the general land office, and one copy to the treasurer of the State.

SEC. 4. That upon the receipt of the above report by the commissioner of the general land office, he shall examine the same, and if made in conformity with this act he shall notify the county surveyor of the fact; and until he receives such notice the surveyor shall not entertain any proposition for the purchase of said land.

SEC. 5. That so soon as the surveyor shall receive the notice provided for in section four of this act, he shall be authorized to receive application for the purchase of said lands in any quantity not less than one hundred and sixty acres, except fractions of less than 160 acres, that may now exist in said counties, provided, that one person or corporation shall not be allowed to purchase more than one section of said land when the same is classed as arable land suitable for farming purposes; but when the same is classed as land suitable only for grazing purposes, it shall be sold in quantities to suit the purchaser, but no person shall be permitted to purchase less than one hundred and sixty acres nor more than three sections.

SEC. 6. That any person desiring to purchase any of the above lands shall make application in writing to the county surveyor, designating the number of the survey, block name of company or individual to whom the certificate, by virtue of which the survey was made, was issued, the quantity he or she wishes to purchase, and, if less than a whole section, the particular part of such section; provided that no fraction of any section of less than one hundred and sixty acres shall be left by any such selection, and that no fractional section of less than three hundred and twenty acres shall be divided. The surveyor shall be entitled to a fee of one dollar for each application, to be paid by the applicant; and he shall, upon

payment of said fee, record said application in a well-bound book to be kept by him for that purpose; he shall endorse such application "Recorded," giving the date, page and volume of the record, and sign his name thereto, and deliver said application to the proposed purchaser.

SEC. 7. That the purchaser shall immediately forward to the State treasurer the above application, together with one-tenth of the appraised value of the land therein designated; provided, that one-fourth of the purchase-money shall be paid in advance on all lands valuable only for the timber thereon. The treasurer shall enter a credit on his books in the name of the purchaser for the amount so received, giving such description of the land as will identify the same. He shall then issue his receipt for said amount and forward it with the above-named application to the commissioner of the general land office, who shall file said application and receipt in his office and issue his certificate in lieu thereof, setting forth the amount paid to the treasurer and the quantity and valuation of the land applied for, which certificate shall authorize the county surveyor to survey the land embraced in the original application, and to enter the same on his books as sold, and he shall not entertain another application to purchase said lands until notified of their forfeiture, as hereinafter specified; provided, that should the applicant fail to make his first payment of one-tenth of the appraised value of the land embraced in his application to the treasurer and present the certificate of the commissioner of the general land office to the surveyor or his deputy within ninety days from the date of the record of his application, then, and in that case, the said land shall be again for sale, and the surveyor shall be authorized to receive application for the same.

SEC. 8. That so soon as the application above named has been received by the surveyor, the applicant shall execute his obligation or promissory note for the balance of the appraised value of the land he desires to purchase, agreeing and stipulating to pay to the governor of the State of Texas and his successors in office, on the first day of January of each year, one-tenth of the amount of his obligation or promissory note, with ten per cent. interest on such amount of the principal as may be due at the date of each payment, giving in said obligation such description of the land purchased as is contained in his application; provided, that the

purchaser may have the privilege of paying the entire amount of the appraised value of such land at the date of purchase, or such amount of principal and interest as may be due at any time subsequent to the execution of his obligation or promissory note; provided, that any payment of principal may be deferred for one or more years, except the first one-tenth or one-fourth, but all payments of both principal and interest must be paid inside of ten years, and all interest must be paid annually on or before the first day of March of each year. Where any land sold under the provisions of this act shall be timbered land, no person shall have the right to cut and remove any of the timber therefrom for the purpose of selling the same until the purchase-money for said land has been paid in full.

SEC. 9. That the note or obligation so executed by the purchaser shall be forwarded to the commissioner of the general land office, and he shall have the same registered in a well-bound book kept for that purpose, setting forth the name of the purchaser, the amount and date of the obligation or note, the tract or tracts for which it is given, and the county in which situated; and shall then endorse the same "Registered," with the date of such registry, sign his name thereto, and deliver the same to the treasurer of the State who shall carefully file the same in his office.

SEC. 10. That upon presentation of the certificate of the commissioner of the general land office provided for in section seven of this act, to the surveyor or his deputy, the said surveyor shall immediately proceed to survey the land embraced in the original application of the purchaser; he shall record the field-notes of such survey or surveys in his office and forward the same, duly certified, to the commissioner of the general land office, who shall file the same with the application and treasurer's receipt of said purchaser, for the surveying and recording herein provided for, the surveyor shall be entitled to the legal fees provided by law, to be paid by the purchaser; provided, that when the field-notes are on file in the general land office, the applicant shall not be required to have the same surveyed.

SEC. 11. That the commissioner of the general land office shall procure a well-bound book in which shall be kept an account with the purchaser of said lands, showing the amount for which the original obligation was given and the interest accruing thereon; and it shall be the duty of the State treas-

urer, upon the payment of the amount due by any purchaser of these lands, to execute his receipt for the same in the name of the purchaser and deliver said receipt to the commissioner of the general land office, who shall credit the account of said purchaser with the amount so paid, and forward his certificate of such payment to the purchaser.

SEC. 12. If upon the first day of March following the maturity of any payment, the interest on money due has not been paid to the State treasurer, and his receipt filed with the commissioner of the general land office, as provided in section eleven of this act, it shall be the duty of said commissioner to notify the county or district attorney of the county in which such land is situated of such failure, giving the name of the purchaser so failing to make payment, with the amount and date of his note, and the amount of principal and interest due at the time of such failure; and upon the receipt of such notice it shall be the duty of the county or district attorney to cause a writ to be issued and served on the purchaser, or, in case of his death, upon his heirs or legal representatives, requiring him or them to show cause why he or they should not be ejected from such land; and upon his or their failure to show that the annual installments of interest have been paid, as above provided, a judgment shall be rendered against him or them, and a writ of possession shall be issued in favor of the State. That a copy of such judgment, under the signature and seal of the clerk of the court rendering the judgment, shall be forwarded to the State treasurer, who shall immediately indorse the obligation of such purchaser "Forfeited," note the fact of such indorsement on the copy of judgment aforesaid, and forward the same to the commissioner of the general land office. The said commissioner shall file said copy of judgment with the claim of such defaulting purchaser, and shall note such forfeiture on the account kept with said purchaser, and shall notify the surveyor of the county in which said land is situated that said land is again for sale.

SEC. 13. That such forfeited tracts shall be sold in the same manner as hereinbefore provided for the original sale of such lands; provided however, that any improvements on said land shall be paid for by the purchaser, and the value of said improvements shall be assessed by the board of appraisers hereinbefore provided for, or such other persons as the governor may designate, when the same pro-

ceedings may be had as provided in this act for the original appraisement and purchase.

SEC. 14. That should any purchaser die before the payment of any one installment, and interest thereon falls due, his administrator, executor or heirs shall have an extension of twelve months within which to pay the same.

SEC. 15. That in case any purchaser desires to sell said land after he has made his first payment on the same, he may do so, but in that event his vendee shall file in the general land office a properly authenticated transfer from said purchaser, and said vendee shall be liable to the obligations and penalties imposed upon said original purchaser; and upon final and full payment on any purchase made under the provisions of this act, the commissioner of the general land office shall issue a patent to the purchaser making the same, or to his vendees or heirs; provided, no one patent so issued shall include more than one section of land, nor portions of any two sections.

SEC. 16. Said lands shall be subject to taxation from the date of the first payment into the treasury of the State.

SEC. 17. That the proceeds arising from the sale of these lands shall be paid into the common-school funds; the principal to be invested in United States or State bonds, and the interest arising therefrom shall be applied to the use of the common schools.

SEC. 18. The commissioner of the general land office and the attorney general shall prescribe such minute details as may be necessary to carry out the objects of this act, and necessary instructions to surveyors and appraisers.

SEC. 19. That all laws and parts of laws in conflict herewith are hereby repealed; provided, nothing herein contained shall affect the rights or obligations of purchasers of these lands under former laws.

SEC. 20. That whereas, the present session of the legislature is so near final adjournment, and the existing law would operate almost to the destruction of the school fund and entail unreasonable expense upon the State, an emergency exists for the suspension of the constitutional rule requiring bills to be read on three several days in each house, and said rule is hereby suspended, and as a public necessity requires that this act should take effect and be in force from and after its passage, it is therefore enacted.

Approved July 8, A. D. 1879.

Takes effect ninety days after adjournment.

Act of April 6, 1881.

Chapter CV.

An act to amend the caption and sections one, two, three, four, five, six, seven and eight of an act entitled "An act to provide for the sale of alternate sections of lands in organized counties as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common-school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith," approved July 8, 1879, and to provide for the sale of such lands in unorganized counties.

Sec. 1. *Be it enacted by the legislature of the State of Texas*, That the caption of the above-recited act shall hereafter read as follows: "An act to provide for the sale of alternate sections of lands in organized and unorganized counties as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common-school fund, to provide for the investment of the proceeds, and to repeal all laws in conflict therewith," and that sections one, two, three, four, five, six, seven and eight of chapter twenty-eight of the laws of the special session of the legislature of the State of Texas, approved July 8, 1879, be amended so as to read as follows:

Section 1. That all the alternate sections of land in the State of Texas, heretofore surveyed or which may hereafter be surveyed by any railroad company or other work of internal improvement, and set apart for the benefit of common schools, shall be brought into market and disposed of in the manner hereinafter provided.

Sec. 2. The county surveyor of the county in which said lands are located, or if the county be unorganized the district surveyor in whose district such land is located, shall view and appraise the same under oath, and make return of the same to the county commissioners' court of the county in which his office is kept, which court shall examine, approve or disapprove the same, and may take other evidence to ascertain the true value of the land, and in case of disapproval said court shall fix a value thereto, and the valuation of said lands in no case

shall be less than two dollars per acre for surveys having fresh water on them or bordering on them, nor less than one dollar per acre for other school lands. The surveyors acting as appraisers of land shall each receive one dollar per section, and in no case to exceed one hundred dollars for the appraisement of all the lands in any one county, to be paid out of the proceeds of the first sale of the land under the provisions of this act. Any person having improvements upon any of such land prior to the taking effect of this act shall have the preference in the purchase thereof for the period of six months next after the value thereof is fixed, at the valuation exclusive of the value of such improvement; provided, that no appraisement of a surveyor of any section of land situated in an unorganized county shall be regarded until he shall have filed an affidavit stating that he knows the locality of said section, and that he personally inspected the same, stating when said inspection was made.

SEC. 3. That as soon as the appraisement is completed the county commissioners' court shall prepare tabulated reports of their action, setting forth the following, to wit: Number of survey, block, quantity in each survey, the name of company or individual to whom the certificate was granted, price per acre of each section, or quarter thereof, if difference exists, value of improvements, remarks giving general description of soil, water and timber. One copy of the above report shall be filed in the office of the county or district surveyor, and shall constitute an archive of his office; one copy shall be forwarded to the commissioner of the general land office, and one copy to the treasurer of the State.

SEC. 4. That upon the receipt of the above report by the commissioner of the general land office, he shall examine the same, and if made in conformity with this act, and if in his opinion the lands therein are properly valued he shall approve the same, and shall notify the county or district surveyor of the fact, and until he receives such notice the surveyor shall not entertain any proposition for the purchase of the said land; provided, that if the commissioner of the general land office believes or has reason to believe the land is valued too low, or that the proper description has not been given of the soil, timber or water, or that the land has increased in value since appraisement, he may, and it shall be his duty to require a supplemental report containing ad-

ditional information or he may send some one from his office; or, if none of his employés can be spared or are not qualified for service, he may appoint some suitable person to visit such county concerning which the report is unsatisfactory, who shall make a report such as is required by the county commissioners' court, for which he, the person sent, if not a regular employé, shall be paid a salary for the time employed not greater than that of the chief clerk of the land office. From the information acquired from every source, the said commissioner of the general land office shall correct the report transmitted by the county commissioners' court, and forward a copy of such corrected tabulated report to the county or district surveyor of the proper county, to be by him kept as an archive of his office, and forward a duplicate copy to the treasurer of the State and retain a copy in the general land office as an archive.

SEC. 5. That so soon as the surveyor shall receive the notice provided for in section four of this act, he shall be authorized to receive applications for the purchase of said land in any quantity not less than one hundred and sixty acres, except fractions of less than one hundred and sixty acres that may now exist in said counties; provided, that no person or corporation shall be allowed to purchase more than one section of six hundred and forty acres of said land when the same is classed as arable land suitable for farming purposes; but when the same is classed as land suitable only for grazing purposes it shall be sold in quantities to suit the purchaser, but no person shall be permitted to purchase less than one hundred and sixty acres, nor more than three sections of six hundred and forty acres within five miles of the geographical center of any county or upon any water front, nor more than seven sections at any other place.

SEC. 6. That any person desiring to purchase any of the above lands shall make application in writing to the county or district surveyor, designating the number of the survey, block, name of company or individual to whom was issued the certificate by virtue of which such survey was made; the quantity he or she wishes to purchase, and if less than a whole section, the particular part of such section; provided, that no fraction of any section of less than one hundred and sixty acres shall be left by any such selection, and that no fractional section of less than three hundred and twenty acres shall be divided. The surveyor shall be entitled to a fee of

one dollar for each application to be paid by the applicant, and he shall, upon payment of said fee, record said application in a well-bound book to be kept by him for that purpose; he shall endorse such application "Recorded," giving the date, page and volume of the record, and sign his name thereto, and deliver said application to the proposed purchaser.

SEC. 7. That the purchaser shall immediately forward to the State treasurer the above application, together with one-twentieth of the appraised value of the land thereon designated, and if the land is chiefly valuable for timber he shall forward the whole of the appraised value. The treasurer shall enter a credit on his books in the name of the purchaser for the amount so received, giving such description of the land as will identify the same; he shall then issue his receipt for said amount and forward it with the above-named application to the commissioner of the general land office, who shall file said application and receipt in his office and issue his certificate in lieu thereof, setting forth the amount paid to the treasurer and the quantity and valuation of the land applied for, which certificate shall authorize the county or district surveyor to survey the land embraced in the original application and enter the same on his books as sold, and shall not entertain another application to purchase said lands until notified of the forfeiture as hereinafter specified; provided, should the applicant fail to make his first payment of one-twentieth, or the whole as the case may be, of the appraised value of the land embraced in his application to the treasurer and present the certificate of the commissioner of the general land office to the surveyor or his deputy within ninety days from the date of the record of his application, then and in that case the said land shall be again for sale and the surveyor shall be authorized to receive application for the same; provided, that no person shall renew his file or file on the same land more than once in twelve months, nor shall any person refile or renew his file in the name of any other person. All applications for the purchase of said lands shall be made in the real name of the person intending to be the actual purchaser thereof.

SEC. 8. That so soon as the application above named has been received by the surveyor, the applicant shall execute his obligation or promissory note for the balance of the appraised value of the land he desires to purchase, agreeing

and stipulating to pay to the governor of the State of Texas and his successors in office, on the first day of January of each year, one-twentieth of the amount of his obligation or promissory note, with 8 per cent. interest on such amount of the principal as may be due at the date of each payment, giving in said obligation such description of the land purchased as is contained in his application; provided, that the purchaser may have the privilege of paying the entire amount of the appraised value of said land at the date of purchase, or such amount of principal and interest as may be due at any time subsequent to the execution of his obligation or promissory note; provided, that any payment of principal may be deferred for one or more years, except the first one-twentieth, but all payments of both principal and interest must be paid inside of twenty years, and all interest must be paid annually on or before the first day of March of each year. When any land sold under the provisions of this act shall be timbered land, no person shall have the right to cut and remove any of the timber therefrom until the purchase-money has been paid in full.

SEC. 2. Whereas, no law is now in force for the disposition of the lands in unorganized counties as contemplated by this act; and whereas, the present session is near its close, therefore an emergency exists and an imperative public necessity is created, that the rule requiring bills to be read on three several days be suspended, that this act take effect from and after its passage, and it is so enacted.

Approved April 6, A. D. 1881.

Takes effect from passage.

ACT OF MARCH 25TH, 1897.

S. B. CHAPTER 37.

An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State under any of the various acts of the legislature, for failure to pay any portion of the interest thereon.

SECTION 1. *Be it enacted by the legislature of the State of Texas*, That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or

shall have been heretofore set apart for the public schools, university, or any of the other various State institutions, has not been paid, it shall be the duty of the land commissioner to endorse on the obligation for said lands, "Lands forfeited," and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment and shall revert to the particular fund to which it originally belonged, and be re-sold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right, at any time within six months after such endorsement of "Lands forfeited" to institute a suit in district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; provided, that if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

This act is cumulative, and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase-money or possession of the land so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold to the State.

SEC. 2. The fact that the authority of the land commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand purchases which can be forfeited under the law, for non-payment of the interest due thereon, and the further fact that it is almost impossible and certainly impracticable to institute so many suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended.

Approved March 25, 1897.

Takes effect 90 days after adjournment.